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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 943

RANGEN, INC., a corporation, BUHL FEED & ICE COMPANY, a corporation, and ELWOOD D. GRIMES,
Petitioners,

vs.

STERLING NELSON & SONS, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COURT

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RANGEN, INC., a corporation, BUHL FEED & ICE COMPANY, a corporation, and ELWOOD D. GRIMES,
Petitioners,

vs.

STERLING NELSON & SONS, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COURT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 18, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 351 F.2d 851 and is appended hereto as Appendix A. The opinion of the United States District Court for the District of Idaho is reported at 235 F. Supp. 393 and is appended hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered October 18, 1965. Rehearing was denied November 23, 1965, and by order dated December 1, 1965, issuance of the mandate was stayed provided appellants file a petition for a writ of certiorari on or before January 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTIONS PRESENTED

1. Does section 2(c) of the Robinson-Patman Act amendments to the Clayton Act (15 U.S.C. § 13(c)) apply to payments made by an Idaho manufacturer of fish food to an employee of the Idaho Fish & Game Commission, one of the purposes of such payments being to induce that employee to influence his superior to continue to purchase the fish food requirements of the Idaho Commission under a custom mix arrangement with the defendant, particularly where:

a. There was no discrimination in price involved;

b. The payments by the defendant to the employee of the state of Idaho were for services rendered to defendant by such employee in connection with the sale of fish food;

c. The employee of the state of Idaho was acting for defendant and not the state of Idaho in the

sales transactions between defendant and the state of Idaho?

2. Are sales of fish food by an Idaho manufacturer to the state of Idaho in the course of interstate commerce, where the fish food is manufactured, sold and consumed entirely within the state of Idaho, the ingredients of the food are not part of a "flow of commerce," and the manufacturer's sales to the state neither affect, nor are affected by, his sales to customers in other states?

3. Are the payments by the manufacturer to a state employee, for the purpose of inducing such sales, in the course of interstate commerce?

4. If section 2(c) applies in such circumstances, may another manufacturer of fish food who was precluded from bidding for the state's business by reason of the maintenance of the custom mix arrangement between the state of Idaho and defendant recover treble damages under section 4 of the Clayton Act (15 U.S.C. 15)?

5. If so, may such damages be based on conjecture as to the likelihood of success of such other manufacturer in competitive bidding with defendant and other manufacturers for the Idaho business and conjecture as to the amount of profits such conjectural successful bidder would have realized during the period allowed by section 4B of the Clayton Act (15 U.S.C. § 15(b))?

STATEMENT OF THE CASE

A manufacturer of fish food, asserting that a competitor had bribed an employee of the State of Idaho

to induce the State to prefer the competitor's product, brought this action to recover treble damages, attorneys' fees and an injunction under the anti-trust laws. Petitioners, defendants below, are the competitor, Rangen, Inc. (Rangen), an Idaho corporation, Buhl Feed and Ice Company, a trade name under which Rangen does business, and Elwood D. Grimes, the state employee. Respondent is Sterling Nelson & Sons, Inc., a Utah corporation. Jurisdiction in the trial court was based upon 28 U.S.C. §§ 1331, 1332 (1964).

The trial court found that Rangen had bribed Grimes, and that Grimes had influenced his superior to continue to prefer the Rangen feed; but these issues, while highly contested in the courts below, are not appropriate to this petition.

The trial court also found that plaintiff had suffered $18,900 damages, and trebled that sum to $56,700 and added $7,500 attorneys' fees on the theory that the bribery violated section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).[1] (App. B, p. 6.) The trial court rejected petitioners' argument that a simple bribe, however opprobrious, was not one of the evils sought to be punished by treble damages under the Robinson-Patman amendments to the Clayton Act, and the court of appeals affirmed — awarding respondent an additional $2,000 for attorneys' fees on appeal. (App. A, p. 24.) Although acknowledging that this was a case of "commercial bribery *unassociated* with price discrimination" (App. A, p. 8), the circuit court held:

[1] The statute is set forth in Appendix C.

> We conclude that section 2(c) is not directed solely against price discriminations through rebates described as brokerage. *Given fulfillment of the express requirements of subsection 2(c), that subsection also encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent* . . . [App. A, p. 14. Emphasis added.]

In its zeal to protect "the fiduciary relationship between a buyer and its agent," the appellate court in fact paid scant attention to the "express requirements of subsection 2(c)" — and the light they shed on the statute's purpose. The court held, for example, that bribes were not payment "for services rendered" within the exception[2] to the statute, because:

> . . . [T]he "services rendered" exception must be read *in light of* the Congressional purposes in enacting Section 2(c), one of which was to guard against practices undermining the fiduciary relationship between buyers . . . and their agents. . . . If "services rendered" were construed to include services performed by a buyer's agent for the seller but against the interest of the buyer, Section 2(c) would not fulfill that Congressional purpose. [App. A, p. 16. Emphasis added.]

The court similarly used the "Congressional purpose" to justify its disregard of the "express requirement" that the recipient of the commissions act "in fact for and in behalf, or . . . subject to the control" of his principal. It sufficed, according to the court, that Grimes acted subject to the state's *right to* control and "it is not

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[2] "It shall be unlawful for any person . . . to pay . . . anything of value as a commission, brokerage, or other compensation . . . **except for services rendered in connection with the sale or purchase of goods, wares or merchandise. . . .**"

significant that in these particular transactions he was not serving the best interests of his employer" — because *"section 2(c) was intended to reach instances of commercial bribery."* (App. A, p. 23.)

In both courts below, petitioners argued that neither Grimes' commissions nor Rangen's sales to the state of Idaho occurred "in the course of" interstate commerce, so that, at best, the claim was subject to the shorter statute of limitations[3] of the Idaho "little Robinson-Patman" act.[4] Although the state's fish food was produced, sold, delivered and consumed entirely within the state of Idaho, and was not part of a "flow" of interstate commerce (App. A, pp. 17-18), the court *conjectured* that the sales were in commerce because they gave Rangen a "definite advantage" and made Rangen "better able to compete" in its interstate business (App. A, pp. 19-20).

Petitioners argued, finally, that plaintiff's evidence of damages was legally insufficient, in that (1) Simpson (who made the purchasing decisions) personally disliked the Nelsons and would not have bought their feed so long as he had any choice in the matter (Tr. pp. 210, 241); (2) Simpson would not have traded his right of choice for a bidding system because he believed it infeasible to purchase fish food on price alone (Tr. 327, 330-332); (3) even if Simpson had switched to bids there was no evidence as to what various competitors would have bid; and (4) even if plaintiff had succeeded in any bid, there was no evidence that it would have

[3] Petitioners contended that the applicable period of limitations was two years.

[4] The Idaho statute is set forth in Appendix C.

realized a profit. The trial court, acknowledging that respondent's claim to damages was "in a sense . . . pure speculation" (App. B, p. 16), nevertheless awarded it damages of $18,900, trebled to $56,700; and the court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Application of Section 2(c) of the Robinson-Patman Act to the Facts of this Case is in Direct Conflict with Decisions of this Court.

Petitioners are aware that bribery is reprehensible business, condemned by public policy. Bribery of a public employee can be prosecuted as a crime under the laws of Idaho[5] and the United States.[6] As an unfair trade practice, bribery has been enjoined by the Federal Trade Commission, e.g. *In re Lenior Woodfinishing Co., et al.*, 30 F.T.C. 1027 (1940); *In re Hull Records, Inc., et al.*, 57 F.T.C. 248 (1960). The injured employer may require its employee to account for the bribes, RESTATEMENT (SECOND), AGENCY § 388; and common law relief may await the injured competitor as well. *Developments in the Law of Competitive Torts*, 77 HARV. L .REV. 88 (1964).

But, in the face of these available sanctions, there is no need — and no argument — for superimposing the additional penalty of treble damages to punish bribery. *Particularly when this can be done only at the cost of making bad law.*

This is not a case of discrimination in price or services. The terms on which customers other than Idaho

[5] Ida. Code, ch. 18, §§ 1301-1309 (1948).
[6] 18 U.S.C. §§ 201-224 (1964).

purchased the Rangen custom mix were not even put into evidence. "This is a simple case of buying influence, sometimes called commercial bribery," said the trial court (App. B, p. 15), and concluded that the question of discrimination was one of sheer conjecture (App. B, p. 11). The court of appeals, likewise, held for respondent on the basis that:

> . . . Section 2(c) is *not* directed solely against price discriminations through rebates described as brokerage. Given fulfillment of the express requirements of subsection 2(c), that subsection also encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent. . . . [App. A, p. 14. Emphasis added.]

As the trial court so candidly put it, this holding makes of Section 2(c) a "maverick" amid the antitrust laws (App. B, p. 11). In so doing, it effectively repudiates this court's analysis of the Congressional history of the Robinson-Patman Act in *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166 (1960), summarized in the statement that:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases,

> rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination. [363 U.S. 166, 168-169] [7]

In holding that bribery is punishable by the antitrust laws generally, the decision conflicts with the distinction between bribery and other conflicts of interest, on the one hand, and matters "conceptually within the antitrust philosophy," on the other, laid down by this court in *United States v. Boston & Maine R.R.*, 380 U.S. 157, 162 (1965), and by the Seventh Circuit in *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794 (1961), and *Norville v. Globe Oil & Refining Co.*, 303 F.2d 281 (1962). And, in applying the Clayton Act to punish efforts to influence public officials, the decision conflicts further with decisions of this court in *United Mine Workers v. Pennington*, 381 U. S. 657 (1965), and *Eastern R.R. Pres. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Finally, in its purported distinction between allowable and disallowable "services rendered," the decision

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[7] A footnote to this passage, which stated that "§ 2(c) was intended to proscribe other practices such as the 'bribing' of a seller's broker by the buyer" was seized upon by the courts below to support their conclusion that the statute provides a remedy in treble damages for every bribe. However, the citations given in the footnote make it clear that Congress was concerned not with bribery per se, but the use of bribery to achieve price discriminations.

takes a step backward from this court's recognition, in *Broch, supra,* that evidence of services rendered transforms a section 2(c) dispute into "quite a different case" (363 U.S. 166, 173), and echoes once again the long-discredited [8] rule of *Great Atlantic & Pacific Tea Co. v. FTC,* 106 F.2d 667 (3rd Cir. 1939).

If allowed to stand, the court of appeals' decision will open wide the door for "an adroit antitrust lawyer [to] use his skill in the use of words to convert many unlawful acts into antitrust violations." *Parmelee Transportation Co. v. Keeshin, supra,* 292 F.2d 794, 804. It will invite abuse of the power of judicial legislation and disregard of the settled rule that "the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations" and "general transgressions of morality," which lie outside the purpose of the legislation being applied. *Chatwin v. United States,* 326 U.S. 455, 464 (1946).

II. The Conclusion that this Case Meets the Commerce Requirements of the Robinson-Patman Act is a Misapplication of the Holdings of this Court and is in Conflict with Decisions of the Sixth and Seventh Circuit Courts of Appeals.

Rangen, to be sure, was an interstate business; and had it the necessary market power, and the inclination, it might have raised its prices in surrounding states and

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[8] See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 192, 193 (1955); Oppenheim, **Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy,** 50 Mich. L. Rev. 1139, 1207 n. 178 (1952); Rowe, **Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman,** 60 Yale L. J. 929, 957-958 (1951).

lowered its prices in Idaho, or vice-versa, and it might have financed its low-price selling in one area by its profits in the other. ***Had it done so,*** its sales to the state of Idaho would apparently have been "in the course of" interstate commerce, under the doctrine of ***Moore v. Mead's Fine Bread Co.,*** 348 U.S. 115 (1954).

In fact, Rangen neither discriminated in price nor subsidized losses in any area with profits from any other. ***There is nothing whatever in the record as to Rangen's profits — on any sales — and the only Rangen prices admitted in evidence were prices to one customer — the State of Idaho.*** (Ex. 30). On these facts the circuit court's holding that "Rangen was better able to compete in his interstate business because he was receiving an unfair preference in his local Idaho business" (App. A, pp. 19-20), is pure conjecture. If it can drag Rangen's sales to the state of Idaho under the *Moore v. Mead* umbrella, it can do the same to *every* intrastate sale of every interstate seller; and the prerequisite that the sales themselves be "in the course of such commerce" will be effectively read out of the Act.

The court of appeals hung its interstate commerce finding entirely upon its analogy to *Moore v. Mead.* (App. A, p. 18). It found expressly that the food which Rangen sold to the state was produced, sold and consumed entirely within the confines of Idaho (App. A, pp. 17-18); and that although certain additives originated out-of-state, upon arrival in Buhl these "were stored in bulk and were finally transformed into ingredients of an entirely new product," and their "flow in commerce" then ceased. *Ibid.* As the court of appeals seemed to

recognize (App. A, p. 18), its holding that the interstate character of a seller's *other* business *per se* permits the conclusion that all its intrastate sales occur "in the course of" interstate commerce, irreconcilably conflicts with decisions from two other circuit courts — *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964); *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962) — and would appear to conflict as well with the consensus of this court in its denial of certiorari in the latter case, 373 U.S. 934 (1963).

The conflict between the misapplication, here, of the rule in *Moore v. Mead, supra,* and the settled law of two other circuits, requires review and clarification by the Court of the last resort.

III. The Court's Conjectures as to Damages Conflict with Decisions of Other Courts of Appeals.

In contending that but for the bribes Nelson would have acquired a measurable chunk of the state's fish food business — resulting in measurable profits — Nelson was faced with several obstacles. For five years before Rangen paid Grimes his first royalty, the state had patronized Rangen exclusively — because James Simpson, the state officer in charge of purchases, preferred negotiated contracts to bids, and he preferred Rangen's feed (Tr. 327-333). The courts below nevertheless *conjectured* that with the end of the royalties Simpson would immediately drop Rangen and switch to purchases on bid alone — a procedure which Simpson believed was unsafe and which he adopted only when political pressure forced him to do so. (Tr. 330).

Again, Nelson produced no evidence as to what each conjectural bidder would have bid, but persuaded the courts below to compute "lost" sales by a comparison of *list* prices—which bore no relation to bids (Tr. 219). Finally, although Nelson's own books did not segregate profits by product and showed net profits of only seven percent on its overall operation (Ex. 20), Nelson persuaded the courts below to accept the interested guess of its officer that its fish food sales yielded profits of sixteen to twenty percent! (App. B, p. 17).

In sustaining all of these conjectures this decision ignores the settled rule that "judgment in antitrust cases cannot be rendered on speculation and guesswork, even against a party who by his own wrongdoing has precluded a more precise computation of damages." *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 769 (1965). In allowing damages where plaintiff proved only loss of a chance to bid, the decision conflicts with *United States v. Griffith, Gornall & Carman, Inc.*, 210 F.2d 11 (10th Cir. 1954); and in allowing damages to one line of plaintiff's business where plaintiff failed to segregate its costs as to that line of business, this decision conflicts with that of the Eighth Circuit in *Siegfried v. Kansas City Star Co.*, 298 F.2d 1 (1962), *cert. denied*, 369 U.S. 819 (1962). These conflicts alone merit this court's review.

CONCLUSION

By construing as a "maverick" one of the provisions of the antitrust laws, the decision in this case creates confusion as to the purposes of those laws, and invites

their further abuse by legal craftsman in search of the bonanza of treble damages. The conflict between this dangerous precedent and the prior decisions of this court and courts of appeals is a fundamental reason requiring review.

The court's holding that the intrastate sales of an interstate seller may be considered, without more, somehow to benefit the seller's interstate business and thereby to occur in the course of interstate commerce, reaches a new high watermark in the construction of that requirement, and effectively repeals it. Because this holding cannot be reconciled with the decisions of other circuits, it too requires review.

Finally, the willingness of the courts below to ignore the uncontested facts in speculating that the demise of Rangen's sales assured the birth of Nelson's, and in preferring an interested guess of profit ratio to the plaintiff's own books and records, repudiates axiomatic principles of proof of damages laid down by other appellate courts, and demands a fresh examination by this tribunal.

Respectfully submitted this 21st day of January, 1966.

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APPENDIX A

United States Court of Appeals For the Ninth Circuit

RANGEN, INC., a corporation, BUHL FEED & ICE COMPANY, a corporation, and ELWOOD D. GRIMES, *Appellants*,

vs.

STERLING NELSON & SONS, INC., a corporation, *Appellee*.

No. 19,740

(October 18, 1965)

Appeal from the United States District Court
for the District of Idaho,
Southern Division

Before: HAMLEY, HAMLIN and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

A manufacturer of fish food, asserting that a competitor bribed an official of the State of Idaho to prefer the competitor's products, brought this action for damages and an injunction. The plaintiff is Sterling Nelson

& Sons, Inc. (Nelson), a Utah corporation licensed to do business in Idaho and other states. The defendants are the competitor, Rangen, Inc. (Rangen), an Idaho corporation, Buhl Feed & Ice Company, a trade name under which Rangen does business, and Elwood D. Grimes, the state official.

In its complaint plaintiff undertakes to state four claims against defendants. The first is based upon section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1527 (1936), 15 U.S.C. §13(c) (1964). The second and third claims are based, respectively, upon sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended 15 U.S.C. §§ 1 and 2 (1964). As to these three claims, district court jurisdiction is predicated upon 28 U.S.C. § 1331 (1964)—federal question. Plaintiff's fourth claim is based upon Idaho Code, § 48-202(c) (1948), which is virtually a counterpart of section 2(c) of the Clayton Act. As to this claim, plaintiff invokes diversity jurisdiction. 28 U.S.C. § 1332 (1964).

The four claims are in the alternative and under each plaintiff seeks treble damages and injunctive relief. Defendants jointly answered, denying essential allegations of the complaint and raising several other defenses. After a trial the district court, sitting without a jury, entered judgment for Nelson and against all of the defendants awarding actual damages of $18,900, trebled to $56,700, plus attorneys' fees in the amount of $7,500. No injunction was issued. *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, D. Idaho, 235 F.Supp. 393.

The conclusions of law and accompanying opinion of the trial court indicate that the damages were awarded on the first claim, involving section 2(c) of the Clayton Act. The trial court rejected the second and third claims, based on sections 1 and 2 of the Sherman Act. The court further ruled that it was inappropriate and unnecessary to consider the fourth claim, based on the Idaho counterpart of section 2(c) of the Clayton Act.

Defendants jointly appeal, challenging various findings of fact and conclusions of law. They also question the applicability of section 2(c) under the facts of this case, and argue, additionally, that certain testimony was irrelevant and prejudicial, and should not have been received in evidence.

During the four years immediately prior to July, 1962, eight companies, including Rangen and Nelson, were in competition with each other in the production and sale of fish food in the western states. At various times during the period, Nelson contacted James C. Simpson, Chief of Fisheries Management for Idaho's Department of Fish and Game (Department), in an effort to sell its product to the state. Simpson, however, refused to accept Nelson's offers, and the state did not purchase any fish food from that company during this period. With insignificant exceptions, Rangen was the sole supplier of fish food to the State of Idaho for consumption at fish hatcheries during these four years.

From December, 1955 to June, 1962, Rangen paid Grimes sums aggregating $24,047.80. During that time

Grimes was superintendent of the state's fish hatchery at Hagerman, Idaho. He was the authority in the Department with respect to the safe utilization and nutritional value of fish foods and with respect to fish food formulae.

None of the payments which Rangen made to Grimes were disclosed to any other employee of the state prior to their discovery in February, 1962. The trial court found that these payments were made pursuant to an understanding between Rangen and Grimes that the latter would use his best efforts to obtain for Rangen the fish food business of the State of Idaho. The trial court further found that Grimes did influence the responsible officials of the state to purchase substantially all of its fish food requirements from Rangen.

The trial court also found that, during the four-year period prior to July, 1962, and as a direct and proximate consequence of the described conduct of Rangen and Grimes, Nelson was precluded from the opportunity to bid for the supply of the state's fish food requirements. The trial court found that, except for the described interference, Nelson would have made gross sales to the State of Idaho aggregating $126,000 during the period in question, and would have realized a net profit of fifteen per cent, or $18,900 thereon.

On this appeal defendants challenge the findings of fact regarding Rangen's purpose in making payments to Grimes. They point to testimony which indicates that Rangen's purpose was to compensate Grimes for experimentally developing the fish food formula

which Rangen produced and sold generally, and to finance further experiments and research by Grimes. Attention is called to the fact that both Grimes and Thorleif Rangen, secretary-treasurer of Rangen, expressly denied that Grimes was paid to influence other Idaho officials. Defendants note that Nelson and other dry fish food manufacturers did not come into the market with a complete trout diet until one or two years after Rangen began making payments to Grimes. The secrecy of the payments was explained by Grimes as due to his fear that state authorities would not approve his "moonlighting" activities in developing fish food formulae.

Had the trial court accepted defendants' explanation of the transaction, there would have been evidence to support that view. But the trial court was not required to accept Grimes' stated reason for the secrecy, especially in view of the obvious impropriety, and patent conflict of interest, inherent in any undisclosed payment arrangement between Rangen and Grimes. Moreover, under the evidence, the trial court was justified in finding that Grimes did very little in the way of research for Rangen during the period 1958 through 1962 which would have justified "royalties."

The trial court was also warranted in attaching significance to the fact that the payments to Grimes ended in 1962, the year Rangen ceased selling fish food to Idaho. Another suspicious circumstance was that Rangen made the payments to Grimes' wife, rather than to Grimes directly. Additionally, the evidence reveals that Rangen's agreement with Grimes was

similar to the technique Rangen was using in Utah for the purpose of attempting to monopolize the sale of fish food to that state.

The finding of fact that Rangen's payments to Grimes were intended as commercial bribes, is not clearly erroneous.

Defendants question the finding of fact that Grimes influenced Simpson to purchase fish food from Rangen. Examination of the record convinces us that this finding is not clearly erroneous.

Defendants next contend that Nelson failed to meet the requirements of proof as to the amount of damages. In particular, defendants question the sufficiency of the evidence to support the findings that: (1) except for the payments by Rangen to Grimes, Nelson would have sold to Idaho approximately one fourth of its fish food requirements during the four-year period; (2) Nelson would have grossed $126,000 on these sales; and (3) Nelson would have made a net profit of approximately fifteen per cent, or $18,900 on the gross sales.

When the first bids were let by Idaho, following discontinuance of the exclusive arrangement with Rangen, there were four bidders. Nelson was the successful bidder on the first of such public offers in 1962. Whether Nelson would have been the low bidder on one fourth of the business during 1958 through 1962, assuming a climate of free competition, is not susceptible of tangible proof. But considering Nelson's position in the industry, and its success in bidding when public

offers were invited in 1962, we think the trial court was justified in finding that Nelson would have obtained one fourth of the business.

Nelson would have grossed $126,000 on sales amounting to one fourth of Idaho's fish food requirements, if Nelson had made the sales at its list prices. Although these prices were below the prices for which Rangen obtained the business in the four-year period, Rangen's prices in the competitive market were well below Nelson's list prices. Moreover, there is no evidence that, for competitive bidding purposes, Nelson ever utilized its list prices.

In the light of past practice, however, the trial court was not required to find that Nelson could have obtained a share of Idaho's fish food business in the 1958 through 1962 period only by reducing its list prices. Having in view Rangen's preferred position with Idaho up to that time, Nelson and other competitors might well have concluded, and correctly, that all they had to do to get a share of the business, was to underbid Rangen's pre-existing actual prices to Idaho.

The trial court's finding that Nelson would have made a net profit of fifteen percent is conservative when compared to estimates, presented by Nelson's witnesses, that the company made from 16.5% to 20% on this kind of business. Defendants assert that estimates of net profit will not do, and that actual accounting records supporting a claimed net profit percentage must be submitted. We do not agree. See *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251; *Richfield Oil Corporation v. Karseal Corporation*, 9 Cir., 271 F.2d 709.

Defendants next question the applicability, under the facts of this case, of section 2(c) of the Clayton Act, relied upon by the trial court in entering judgment for plaintiff Nelson.[1] Defendants present two lines of argument under this heading. The first of these is that section 2(c) does not apply to the case at bar because that statute is directed solely against price discrimination through rebates disguised as brokerage, not against commercial bribery unassociated with price discrimination.

Subsection (c) of section 2, with which we are here concerned, does not expressly relate solely to price discrimination, and defendants do not so contend. They argue, however, that read in the light of its statutory context and legislative history, and as interpreted by most courts, such a limitation must be read into section 2(c).

We find nothing in the statutory context of section 2, which requires that subsection (c) be limited to instances of price discrimination.

With regard to the legislative history, defendants cite excerpts which amply demonstrate that in enacting

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[1]Section 2(c) reads:

"(c) Payment or acceptance of commission, brokerage or other compensation.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid."

section 2(c), the prime concern of Congress was to curtail price discriminations accomplished by pseudo-brokerage arrangements. The Supreme Court, in *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 169, noted this principal legislative concern. But, in a footnote (page 169), the Court also expressed the view that the legislative history demonstrates a Congressional intent to proscribe other practices such as the bribing of a seller's broker by the buyer.[2]

This view is further borne out by the statement in the House Report, quoted below, indicating that Congress was concerned with preserving the fiduciary relationship between a broker and his client.[3]. We are not aware of any legislative history in which the application of section 2(c) to cases of commercial bribery not involving price discrimination is expressly disclaimed.

In our view, the legislative history tends to confirm, rather than negate, a construction of section 2(c) which renders it applicable under the facts of this case.

Defendants rely upon the recent decision of the Supreme Court in *United States v. Boston & M.R.R.*, 380 U.S. 157, as establishing that ordinary bribery is not a basis for recovery under the antitrust laws.

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[2] The Broch court referred to debates which appear at 80 Cong. Rec. 7759-7760, 8111, 8112.

[3] H.R. Rep. No. 2287, 74th Cong. 2d Sess. p. 14 (1936):
"The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume."

That action was a prosecution against the railroad under section 10 of the Clayton Act, 38 Stat. 734 (1914), 15 U.S.C. § 20 (1964). The gist of the indictment was that three of the railroad officers had accepted bribes from the purchaser of some of the railroad's railway cars, as compensation for making the sale without competitive bidding. The Court, rejecting the Government's contention that the bribes and related agreements gave the officers a "substantial interest" in the purchasing company, in violation of the Act, said:

> "But it is doubtful that this indictment, as illuminated by the bill of particulars, alleges anything more in substance than a bribe. Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference." 380 U.S. at 162.

We do not regard the quoted observation as a definitive ruling that under no set of circumstances could commercial bribery be violative of any antitrust law. In our case the bribery not only undermined a fiduciary relationship which Congress sought to protect, but gave one seller a grossly unfair advantage over a competing seller. Where commercial bribery is associated with evils which a particular provision of the antitrust laws was designed to prevent, the fact that it was a bribery rather than a more defensible arrangement ought not to preclude application of the statute.

The view that price discrimination is not a necessary element of a section 2(c) violation has found

support in the cases construing that section. In *Federal Trade Comm'n v. Washington Fish & Oyster Co.*, 9 Cir., 271 F.2d 39, 44, this court said: "Subsections (c), (d) and (e) of section 2 of the Clayton Act, as amended, unqualifiedly make unlawful certain business practices other than price discriminations." In *Southgate Brokerage Co. v. Federal Trade Comm'n*, 4 Cir., 150 F.2d 607, it was argued that without proof of price discrimination among buyers, the receipt of brokerage did not violate section 2(c). This argument was rejected by the court on the ground that "price discrimination, which is covered by section 2(a) of the Act, 15 U.S.C.A. § 13(a), is not necessary to a violation of section 2(c), . . ." 150 F.2d at 609.

Section 2(a) deals expressly with the granting of discriminatory prices, while section 2(c) prohibits a particular trade practice deemed by Congress to be detrimental to competition. Section 2(c) is to be construed independently, without reference to the price discrimination section. *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 3 Cir., 106 F.2d 667, 675-77; *Oliver Bros. v. Federal Trade Comm'n*, 4 Cir., 102 F.2d 763, 767-68; *Biddle Purchasing Co. v. Federal Trade Comm'n*, 2 Cir., 96 F.2d 687,690. A violation of section 2(a) is not necessarily a violation of section 2(c). *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 170-71.

Similarly, section 2(b) which affords a defense to a showing of price discrimination has been held inapplicable where a violation of section 2(c) is charged.

See *Federal Trade Comm'n v. Washington Fish & Oyser Co.*, 9 Cir., 271 F.2d 39. The Supreme Court in *Federal Trade Comm'n v. Simplicity Pattern Co.*, 360 U.S. 55, holding the justification defense of section 2(b) inapplicable in a section 2(e) proceeding, stated:

> "Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations. . . . In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." 360 U.S. at 65.

A section 2(c) case came before the Supreme Court for the first time in *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166. The court held that section 2(c) applies to a seller's broker who makes allowances to the buyer indirectly through reduced brokerage charges to the seller. The Court, however, limited this holding to instances of discrimination. "A price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." 363 U.S. at 176.

There has been some speculation that the *Broch* case may have superimposed a requirement of price discrimination on section 2(c). Rowe, *Price Discrimination Under the Robinson-Patman Act* 344-45 (1962); *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 189 (dissenting opinion). However,

discrimination was used in *Broch* to determine if the price arrangement was an "in lieu" of brokerage transaction; and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage.

In *Fitch v. Kentucky-Tennessee Light & Power Co.*, 6 Cir., 136 F.2d 12, the plaintiff power company recovered damages under section 2(c) from its former president who had accepted bribes in connection with the power company's purchases of coal. The court there found that commercial bribery was within the intended proscription of section 2(c) despite the fact that the compensation was not passed on to the buyer. The court in *Fitch* reviewed the prior decisions which had construed section 2(c) as an absolute prohibition of brokerage payments except for services rendered, and concluded that the threat to competition posed by such bribery, brought it within the terms of section 2(c).

Defendants criticize the *Fitch* opinion, asserting that it wholly ignored the statute's context and historical basis. Enough is said above to indicate that we do not share this view. Defendants also state that, in *Fitch*, there was an element of price discrimination, since the plaintiff there was the buyer who presumably paid more because of the disloyalty of his employee, while here the plaintiff is a seller, who complains only that it was deprived of business. But while this factual distinction exists, the rationale of *Fitch*, as defendants acknowledge, is based upon a flat rejection of the con-

tention that the Robinson-Patman Act is concerned only with price discrimination.

We conclude that secton 2(c) is not directed solely against price discriminations through rebates described as brokerage. Given fulfillment of the express requirements of subsection 2(c), that subsection also encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods, wares or merchandise.

Defendants also argue, with regard to the general applicability of section 2(c), that sales to a sovereign are excluded,and hence payments made to Grimes in connection with Rangen's sales to the State of Idaho are not covered by that subsection. Several district courts have apparently so ruled, on the theory that such an exemption is required by the policy which allows the sovereign to buy at the best price obtainable.[4]

Assuming that there is such a policy and that it gives rise to such an exemption in an appropriate case, it has no room to operate here. Idaho was the victim, not the beneficiary, of the transactions here in question. It paid more than it should have, instead of less. Under the circumstances of this case, enforcement of section

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[4] See **Sperry Rand Corp. v. Nassau Research & Development Associates, Inc.**, 152 F.Supp. 91, 96 (E.D.N.Y. 1957); **Sachs v. Brown-Forman Distillers Corp.**, 134 F.Supp. 9, 16 (S.D.N.Y. 1955), aff'd per curiam 234 F.2d 959 (2nd Cir. 1956); **General Shale Products Corp. v. Struck Construction Co.**, 37 F.Supp. 598, 602-603 (W.D. Ky. 1941), aff'd on other grounds 132 F.2d 425 (6th Cir. 1942).

2(c) will serve, rather than defeat, the asserted policy, by discouraging bribery of state officials.

Defendants' next line of argument in questioning the applicability of section 2(c) under the facts of this case, pertains to the express requirements of that subsection.

A payment or grant " . . . for services rendered in connection with the sale or purchase of goods, wares, or merchandise, . . ." is not forbidden by section 2(c).[5] Defendants assert that the payments made by Rangen to Grimes were "for services rendered," pointing to the finding of fact that the purpose of the payment was to influence Grimes' conduct as a state employee, in an effort to gain the fish food business for Rangen.

In the earlier cases construing section 2(c), services furnished by a buyer's agent to a seller were held not to be "services rendered" within the exception referred to above.[6] This emasculation of the services rendered exception has been criticized as unduly hindering legitimate brokerage.[7] The Supreme Court in *Federal Trade Comm'n v. Henry Broch & Co.*, 363 U.S. 166, 173, acknowledged this criticism of the construction

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[5] Section 2(c) is quoted in note 1.

[6] Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n, 3 Cir., 106 F.2d 667, 674-75; see, also, Modern Marketing Service v. Federal Trade Comm'n, 7 Cir., 149 F.2d 970, 978; Quality Bakers v. Federal Trade Comm'n, 1 Cir., 114 F.2d 393, 398; Oliver Bros. Inc. v. Federal Trade Comm'n, 4 Cir., 102 F.2d 763, 770; Biddle Purchasing Co. v. Federal Trade Comm'n, 2 Cir., 96 F.2d 687, 691.

[7] Report of the Attorney General's National Committee to Study the Antitrust Laws 192 (1955); Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L.Rev. 1139, 1207 n. 178 (1952); Rowe, Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 Yale L.J. 929, 957-58 (1951).

of the "services rendered" exception; some of the language in that opinion indicates that the exception may find new life.[8] This court, in *Federal Trade Comm'n v. Washington Fish & Oyster Co.*, 9 Cir., 282 F.2d 595, indicated that services of a promotional nature performed by the buyer for the seller could be within the exception while services which a buyer normally performs for himself would not be included.

Nevertheless, the "services rendered" exception must be read in the light of the Congressional purposes in enacting section 2(c), one of which was to guard against practices undermining the fiduciary relationship between buyers and sellers on the one hand, and their agents, representatives, or other intermediaries on the other, in a section 2(c) transaction. If "services rendered" were construed to include services performed by a buyer's agent for the seller but against the interest of the buyer, section 2(c) would not fulfill that Congressional purpose. We do not believe that this exception may be used as a statutory shield to protect illicit conduct which the subsection as a whole was designed to suppress.

We conclude that the "services rendered" exception to section 2(c) is not applicable under the facts of this case.

Payments which otherwise meet the requirements of section 2(c) are not unlawful unless made by " . . any

[8] In **Broch**, at page 173, the Supreme Court said:
"There is no evidence that the buyer rendered any services to the seller. . . . We would have quite a different case if there were such evidence and we need not explore the applicability of §2(c) to such circumstances."

person engaged in comerce, in the course of such commerce. . . ." Construing somewhat similar language contained in section 2(a) of the Clayton Act, the Supreme Court has held that in order for sales to come under that subsection, " . . . they must have been made in interstate commerce." *Standard Oil Co. v. Federal Trade Comm'n,* 340 U.S. 231, 236-37.[9] Defendants argue that, under the facts of this case, it must be held that the payments to Grimes by Rangen were not made in the course of interstate commerce.

The pertinent facts may be briefly stated. Rangen and Nelson were engaged in the sale of fish food in several states. However, Rangen prepared its formula for fish supplement sold to the State of Idaho entirely in Buhl and Hagerman, Idaho. To this it added the other components of whey, yeast and fish meal, and pelletized the mix, all at its plant in Buhl. Upon arrival in Buhl, the additives which originated out of state were stored in bulk and were finally transformed into ingredients of an entirely new product.

Some of the finished product was then delivered to the state hatchery at Hagerman, Idaho, a distance of approximately fifteen miles. The rest was stored at Buhl, Idaho for pick-up by the state for delivery to other state hatcheries. No sale to the state crossed state lines. The feed was consumed at hatcheries entirely within the State of Idaho, and Rangen was paid by check from the state capital at Boise.

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[9] We say "somewhat similar language" because section 2(a) contains a third reference to interstate commerce, not contained in section 2(c). See **Borden Company v. Federal Trade Comm'n, 7 Cir., 339 F.2d 953, 955.**

The Supreme Court has adopted the "flow of commerce" concept with regard to Robinson-Patman violations. Thus temporary storage of an interstate product, or an interruption in its transport, does not deprive it of its interstate character. *Standard Oil Co. v. Federal Trade Comm'n,* 340 U.S. 231, 238. But this concept is inapplicable here because the ingredients which Rangen brought into Idaho from other states not only came to rest in Idaho but were there transformed into an entirely new product.

Borden Company v. Federal Trade Comm'n, 7 Cir., 339 F.2d 953, and *Willard Dairy Corp. v. National Dairy Products Corp.,* 6 Cir., 309 F.2d 943, involving section 2(a) of the Clayton Act, tend to support the view that transactions of the character involved in our case are not "in the course" of interstate commerce. *Fitch v. Kentucky-Tennessee Light & Power Co.,* 6 Cir., 136 F.2d 12, in which the plaintiff in a section 2(c) action prevailed, is distinguishable, because there the critical transactions consisted of the sale of coal across state lines.

However, plaintiff and the trial court rely upon *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, as requiring a holding that Rangen's payments to Grimes were in the course of interstate commerce. This was a price discrimination case under section 2(a). The plaintiff operated a bakery in New Mexico, conducting an intrastate business; defendant also operated a bakery in New Mexico, selling bread in that state and also in Texas. Defendant was linked by corporate ownership with several other bakeries operating in New Mexico

and Texas. Defendant cut his prices in New Mexico but not in Texas and was sued for violating section 2(a) and injuring plaintiff's business. Despite the contention that this was purely local—affecting a local competitor not doing interstate business—the Supreme Court held the Robinson-Patman Act applicable.

The following quotation summarizes the Court's reasoning:

> "We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources. . . ." 348 U.S. at 119.[10]

Granted that the facts of *Moore* vary from those of our case, it seems to us that its rationale is nevertheless applicable. In *Moore,* defendant was able to reduce local prices because of the financial resources provided by its interstate business. In our case, Rangen was better able to compete in his interstate business because he was

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[10] The Court also quoted remarks of Congressman Utterback, manager of the bill in the House:

" 'Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State.' " 348 U.S. at 120.

receiving an unfair preference in his local Idaho business.

Within the rationale of *Moore*, the payments to Grimes were made in the course of interstate commerce because they created influences intrastate which injured the free competitive interstate commerce in fish food outside Idaho. The concept to which we refer is something more than the broader test of "affecting interstate commerce," which is applied under the Sherman Act. Critical here is the fact that Rangen's payments to Grimes gave it a definite advantage in its own interstate dealings—the "beneficiary" was its interstate business—and therefore the payments must be regarded as having been made in the course of its own interstate commerce.

It is necessary to the application of section 2(c) that the transaction between Rangen and the State of Idaho constitute a sale of "goods, wares, or merchandise," and not merely a contract for services. The trial court found that the transaction constituted such a sale.[11] Defendants, however, argue that it was a contract for services.

It is true that the State of Idaho supplied some of the ingredients. Rangen, however, supplied the whey, yeast and fish supplement. The latter ingredient made

[11] The trial court in its finding of fact number 5 stated: "Realistically, the transactions between Rangen, Inc., and the State of Idaho were sales of processed fish food and not contracts for services. The proportion supplied by the State of the ingredients of the final product delivered was relatively insignificant, and this was done for the purpose of circumventing the State Purchasing Agent and of attempting to give to a purchase transaction the appearance of a contract for services."

up at least fifty per cent of the mix, and possibly as much as sixty-three per cent. Defendants concede that Rangen did not bill the state separately for its mixing service, but argue that this service charge was nonetheless included in the prices quoted. At the trial defendants' accounts receivable ledger was introduced; this showed a listing of ingredients sold to the state with no separate charge, or separate billing at least, for services.

In connection with the "commerce issue," defendants contended that the ingredients had been converted into an entirely new product, the fish food. Similarly the ingredients furnished by the state could be said to have lost their identity, the sale being for the finished fish food. The formula for the fish food was a secret, and only the food made from Rangen's formula was being sold.

Under the facts reviewed above, we believe that the trial court correctly characterized this transaction as a sale of fish food, and not a contract for services.

A payment is not covered by section 2(c) of the Clayton Act unless the payment was made either: (1) to the other party to the transaction, or (2) " . . . to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

Defendants argue that this requirement of section 2(c) was not fulfilled because as the trial court found,

payments received from Rangen were computed as a percentage of gross sales of fish food made by Rangen, Inc. to customers other than the State of Idaho. According to this finding, defendants urge, Grimes was paid for services he rendered to Rangen in entirely unrelated sales to third parties.

We have determined that the trial court's finding of fact that a principal purpose of Rangen in making payments to Grimes was to cause the latter to influence Idaho state officials to purchase substantially all its requirements of fish food from Rangen, is not clearly erroneous. This purpose being established, the fact that the payments were roughly computed on a basis related to Rangen's other sales is of no consequence, being indicative only of subterfuge.

In order to find a violation of section 2(c), the payments involved must be made to a party to the transaction or to someone connected with that party in an agency, representative, or intemediary relationship. Reference must be made to the transactions in question to determine whether or not the necessary relationship exists. In this case, Grimes was an employee of the State of Idaho, and, although not officially related to the state's purchasing policies, he did influence the decisions concerning the purchase of fish food. Grimes was instrumental in bringing about and maintaining the exclusive sales arrangement between the State of Idaho and Rangen; and he can therefore be regarded as an "intermediary" within the meaning of section 2(c).

In our view it is wholly immaterial that Grimes

was not acting as an "agent" or "representative" in the customary sense, since his status as an "other intermediary" is established. As an employee of the state and its fish nutrition expert, Grimes was at all times subject to the control of his employer as required by section 2(c); and, it is not significant that in these particular transactions he was not serving the best interests of his employer, the State of Idaho.

The legislative history referred to above, indicating that section 2(c) was intended to reach instances of commercial bribery, makes clear that the section is not limited to cases in which the intermediary acts in good faith. Likewise, and for the same reason, we conclude that the person receiving the payments need not turn them over to his principal, in order for such payments to be made to an agent, representative, or other intermediary, within the meaning of that section.

There remains a question as to the admissibility of evidence. The trial court received in evidence, over the objection of defendants, testimony to the effect that, beginning in April, 1956, Rangen employed one Junius Powell, a fish hatchery superintendent for the State of Utah. This testimony was produced to support an inference that Rangen was following the same practice in Idaho that he had followed in Utah.

The purpose of Rangen's payments to Grimes was in issue. The evidence that Rangen's similar practices, employed in an adjoining state, were designed to influence state action, is relevant as tending to show the purpose of the payments in Idaho. While defendants

believe the Utah evidence is indecisive, this was for the trial court to decide. The court has more latitude in matters of this kind where, as here, the case is tried to the court without a jury, for there is less likelihood of prejudice disproportionate to the probative value of the evidence. The court did not err in receiving this evidence.

Plaintiff requests an allowance of attorneys' fees on appeal. Defendants make no response to the request. Such fees are allowable in a case of this kind. *Twentieth Century Fox Film Corporation v. Goldwyn,* 9 Cir., 328 F.2d 190. Plaintiff is allowed an attorney's fee on appeal in the amount of $2,000.00.

Affirmed.

APPENDIX B

In The United States District Court For the District of Idaho

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STERLING NELSON & SONS, INC., a corporation, *Plaintiff*,

vs.

RANGEN, INC., a corporation, BUHL FEED & ICE COMPANY, a corporation, and ELWOOD D. GRIMES, *Defendants*.

No. 19,740

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

The Court, having considered the evidence and the briefs and arguments of counsel, does hereby make the following Findings of Fact:

FINDINGS OF FACT

1. Plaintiff is a corporation organized and existing under the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah, and licensed

to do business in the State of Idaho and various other States. Plaintiff is engaged in the manufacture and sale of fish food and other products in various States of the United States, including Idaho. Plaintiff competes with the defendant in the sale of fish food in several States, including the State of Idaho.

2. Defendant Rangen, Inc., is an Idaho corporation with its plant in Buhl, Idaho. It is engaged in the manufacture and sale of fish food and other products in various States of the United States, including Idaho. It purchases ingredients for the manufacture of fish food in States other than Idaho, as well as Idaho, and sells fish food in various States, including the State of Idaho.

3. Buhl Feed and Ice Company, Inc., is merely a trade name of Rangen, Inc., under which Rangen, Inc., does business.

4. Defendant Elwood D. Grimes is a citizen and resident of the State of Idaho and was employed by the State of Idaho in the Department of Fish and Game from 1939 to June 1, 1962, first as a biologist and then, from approximately 1950, as the Superintendent of the State's fish hatchery at Hagerman, Idaho.

5. During the four years immediately prior to the commencement of this action, the State of Idaho paid Rangen, Inc., approximately $539,600 for fish food sold by Rangen, Inc., to the State of Idaho. During such period, Rangen, Inc., was with insignificant exceptions, the sole supplier of fish food to the State

of Idaho for consumption at state fish hatcheries. Realistically, the transactions between Rangen, Inc., and the State of Idaho were sales of processed fish food and not contracts for services. The proportion supplied by the State of the ingredients of the final product delivered was relatively insignificant, and this was done for the purpose of circumventing the State Purchasing Agent and of attempting to give to a purchase transaction the appearance of a contract for services.

6. Rangen, Inc., for the period December, 1955, to June, 1962, paid defendant Elwood Grimes the sum of $24,047.80. Payments by Rangen, Inc., to Grimes were not disclosed to anyone in the Department of Fish and Game nor to any other employee of the State of Idaho until they were discovered in February, 1962. Such payments were computed roughly but inaccurately as a percentage of gross sales of fish food made by Rangen, Inc., to customers other than the State of Idaho. During such period, defendant Elwood Grimes was the authority in the Idaho Department of Fish and Game with respect to the safe utilization and nutritional value of fish foods and with respect to fish food formulae. The payments made by Rangen, Inc., to Elwood D. Grimes were made for the purpose, at least in substantial part, of the influencing Grimes' conduct as an employee of the State of Idaho with respect to recommendations of fish food products for purchase by the State of Idaho, and such payments were made pursuant to an understanding between Rangen, Inc., and Grimes that Grimes would use his best efforts to obtain for Rangen, Inc., the fish food business of the

State of Idaho. Grimes did, in fact, influence the responsible officials of the State of Idaho to purchase substantially all its requirements of fish food from Rangen, Inc., and Grimes obstructed and impeded the testing of products of other possible suppliers, including plaintiff, and action on favorable reports of such tests.

7. At various times during the period preceding 1962, plaintiff solicited James C. Simpson, Chief of Fisheries Management, for the Idaho Department of Fish and Game, and other officials and employees of the State of Idaho, to purchase plaintiff's fish food, but James C. Simpson refused to accept plaintiff's offers to sell fish food to the State of Idaho and the State of Idaho failed to purchase any fish food from plaintiff during the four years immediately preceding the commencement of this action. The State of Idaho was not bound by any contract to purchase fish food from defendant Rangen, Inc., during the four years immediately preceding the commencement of this action, and during that period, could have at any time purchased fish food from any other source, including plaintiff. The State commenced to purchase fish food from other sources in 1962 on public bids under the State purchasing procedures, after disclosure of the payments by Rangen, Inc., to Grimes. Plaintiff was the successful bidder on the first of such public offers for bids. The fish food offered for sale by plaintiff had been experimentally tested in 1958 and found suitable and substantially equal in grade and quality to that sold by Rangen, Inc. Grimes, in 1957, refused to test plaintiff's product.

8. There were approximately eight companies, including defendant Rangen, Inc., and plaintiff Nelson & Sons, in competition with each other in the production and sale of fish food in the western states during all or part of the four year period prior to July, 1962. Four companies, including plaintiff and defendant Rangen, Inc., made offers or bids to supply the State of Idaho fish food requirements when the State first advertised for public offers in 1962. During the four year period immediately prior to July, 1962, the State of Idaho paid Rangen, Inc., approximately $539,600 for fish food sold by Rangen, Inc., to the State of Idaho. During such four year period, as a direct and proximate consequence of the wrongful conduct of defendant Rangen, Inc., and defendant Grimes, as aforesaid, plaintiff was precluded from an opportunity to bid to supply the fish food requirements of the State of Idaho and to make inter-state sales of its products to the State of Idaho. It is reasonably and conservatively probable that plaintiff Sterling Nelson & Sons, Inc., would have sold to the State of Idaho approximately one-fourth of its fish food requirements, representing gross sales at plaintiff's prices (Ex. 20) of approximately $126,000 during such four year period if there had existed a competitive market unaffected by the wrongful and restraining conduct of defendants. It is reasonably probable that plaintiff would have realized a net profit of approximately fifteen per cent on the gross sales. Plaintiff was damaged by defendants' wrongful conduct in the amount of $18,900.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds:

1. Defendant Rangen, Inc., while engaged in commerce, in the course of such commerce paid money as compensation to Elwood D. Grimes, who was an agent and representative of and acting in behalf of the State of Idaho in connection with the sale by Rangen, Inc., and the purchase by the State of Idaho of processed fish food, in violation of 15 U.S.C. § 13 (c).

2. Plaintiff, Sterling Nelson & Sons, Inc., was injured in its business by reason of the aforesaid violation of the anti-trust laws and sustained damages in the amount of $18,900.

3. The actual damages should be trebled by virtue of the requirements of 15 U.S.C. §15, and plaintiff is entitled to judgment against defendants for $56,700, together with costs of suit and a reasonable attorney's fee in the amount of $7,500.

OPINION

It is the opinion of the Court that the facts as proved and found establish a cause of action in plaintiff under 15 U.S.C., §15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or

has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731."

ROBINSON-PATMAN ACT

FIRST CAUSE OF ACTION

The first of the "antitrust laws" upon which plaintiff relies to sustain his suit is the Robinson-Patman Act (15 U.S.C., §13), adopted in 1936 as an amendment to Section 2 (c) of the Clayton Act. Plaintiff relies particularly on Section 13 (c), which provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

It is to be noted that each of the subdivisions of Section 13 deals, as did the original Section of the Clayton Act, with the subject of price discrimination. The amendments enacted in the Robinson-Patman Act spell out with greater particularity than was found

in the original Clayton Act prohibitions of certain business practices which Congress defined as constituting unlawful price discrimination. Sections 13 (a) proscribes, in general terms, price discrimination between different purchasers where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. Section 13 (b) deals with the burden of proof and possible defenses if a price discrimination has been established. Section 13 (c) proscribes the payment of a brokerage or commission to a person acting on behalf of or subject to the direct or indirect control of the other party. Section 13 (d) proscribes side payments to a customer for services or facilities, such payments not being available on equal terms to all other customers. Section 13 (e) proscribes furnishing services or facilities to one purchaser which are not equally available to other purchasers. Section 13 (f) proscribes a person engaged in commerce from receiving the benefit of a prohibited discrimination in price.

It is true that Section 13 (c), upon which plaintiff specifically bases his first cause of action, does not, in terms, refer to price discrimination. Yet it could be interpreted in pari-materia with the whole section of which it is a part so as not to be considered an isolated definition of an unlawful trade practice apart from the concept of price discrimination to which it is in substance and by statutory context quite patently related.

Insofar as the payment of a brokerage or commission generally and without reference to the idea of price discrimination should be considered unlawful

as a trade practice, this subject has been separately considered by Congress in the Federal Trade Commission Act (15 U.S.C. 45).

In view of the foregoing, if this were a case of first impression, this Court would be inclined to hold that commercial bribery of the kind here involved was not intended to be included within the proscriptions of the Robinson-Patman amendments to Section 2 (c) of the Clayton Act [15 U.S.C. 13 (c)]. Plaintiff, however, has cited the decisions in Fitch v. Kentucky-Tennessee Light & Power Co. (6 CCA 1943) 136 F.2d 12, and Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc. (N.D. Ohio 1964), 227 F. Supp. 829, for the law to sustain its cause of action under the Robinson-Patman Act. In both cases, it was held that the buyer had a cause of action under Section 15 (c) against a seller who had bribed the agent of the buyer. In discussing the contention that there was no price discrimination as such, the Court, in the Fitch case, said:

> "Appellant argues that the Act is concerned only with price discriminations extended by sellers to different buyers; and that there is no proof that the seller in this case so discriminated. The fact is that the buyer is suing for damages, not because of receiving the benefit of discriminatory prices, but because, on account of the fraud, it was obliged to pay more for its coal than it would otherwise have paid in a competitive market. While various sections of the statute are concerned with price discrimination, we do not agree with the claim that the provisions of the Act are limited thereto.
>
> "Under Sec. 13(c) (Title 15 U.S.C.A.), the

granting of a commission to the agent of the other party to the transaction was specifically forbidden as an unfair trade practice because of its tendency to lessen competition and create monopoly. Oliver Bros. v. Federal Trade Commission, 4 Cir., 102 F. 2d 763. The section deals with a trade practice which has frequently resulted in unfair competition. It deals with one particular subject, namely, allowances or brokerage of such a nature and kind that commerce, generally, is affected thereby; and it constitutes a specific prohibition of a specific act. Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 3 Cir., 106 F. 2d 667, certiorari denied 308 U.S. 625, 60 S. Ct. 380, 84 L. Ed. 521. 'It is clear that the statute prohibits payment of brokerage by the seller to the buyer or his agent or representative or controlled intermediary except for services rendered.' Biddle Purchasing Co. v. Federal Trade Commission, 2 Cir., 96 F. 2d 687, 691, certiorari denied 305 U.S. 634, 59 S. Ct, 101, 83 L. Ed. 407. 'It is plain enough that the paragraph, taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent * * * Paragraph (c) is a distinct and complete provision in itself making illegal the giving or taking of commissions or their equivalent under the circumstances mentioned in the text.' Quality Bakers of America v. Federal Trade Commission, 1 Cir., 114 F. 2d 393, 398."

Assuming this to be so, who can take advantage of the violation of the Section? The Fitch and Canadian Ingersoll-Rand cases hold that the buyer, the cost to whom of the product sold was increased inferrably by the amount of the bribe paid, has a cause of action for

such damages. From one point of view, there was price discrimination here because, it may be argued, the buyer paid more for the product than others whose custom did not have to be induced by bribery. This, of course, is not necessarily so and more commonly the actual price to all customers might be the same and the seller employing commercial bribery where necessary would charge such costs to general overhead rather than to the specific sale.

Although both Fitch and Ingersoll-Rand may be rationalized as price discrimination cases inasmuch as the price to the particular buyer may have been greater than the price offered other buyers, the Sixth Circuit in the Fitch case, as the above quotation shows, preferred to consider Section 15 (c) as an independent "maverick" prohibition of an unfair trade practice rather than as a provision which must be interpreted within the general concept of price discrimination. This accords with the specific language of the Section which itself makes no reference to price discrimination. The Supreme Court, by footnote comment in Federal Trade Commission v. Broch & Co. (1960), 363 U.S. 166, 169, has inferentially approved the rationale of the Fitch case, stating, "And although not mentioned in the Committee Reports, the debates on the bill show clearly that Section 2(c) was intended to proscribe *other practices* such as the 'bribing' of a *seller's* broker by the *buyer.*" (Italics added). We, therefore, conclude that plaintiff has proved a cause of action under 15 U.S.C. 13 (c).

Section 15 (c) applies to "any person engaged in commerce" who, "in the course of such commerce * * * pays * * * anything of value * * * to a representative of the other party." We have found that Elwood Grimes was an influential employee of the State of Idaho who, for compensation paid, exerted such influence as he had to establish and preserve Rangen, Inc., as the exclusive source of supply for Idaho's fish food requirements. The evidence shows that both plaintiff, Nelson, and defendant Rangen, Inc., were engaged in interstate commerce as defined in the Act (15 U.S.C. 12), selling their products throughout the Western States and on the Atlantic Seaboard in competition with each other and with other suppliers. True, the particular sales by Rangen to Idaho were intra-state, but the impact of defendant's wrongful conduct was to prevent or impede an interstate negotiation and possible sale by plaintiff Nelson & Sons to Idaho and negotiations with and possible sales in interstate commerce by other out-of-state fish food producers.

Authorities in support of the statement, "It is not enough * * * that defendant be engaged in interstate commerce but it must also be shown that the sale complained of was one occurring in interstate commerce", are collected in Willard Dairy Corp. v. National Dairy Products Corp. (6 CCA 1962), 309 F. 2d 943, cited by defendants. Plaintiff relies on Moore v. Mead's Fine Bread Co. (1954), 348 U.S. 115, and argues that it is not essential that the sale complained of be an interstate sale. The Willard Dairy case distinguished the Moore case with the statement, "In Moore the

purchases involved in the alleged discrimination were in interstate commerce and interstate sales of like grade and quality were discriminated against." But in Willard Dairy, the Court was careful to say that the situation there involved only interstate sales, that is, sales in and around Willard, Ohio where the discriminatory price-cutting occurred in competition with plaintiff as compared with sales in and around Marion, Ohio—all from a production source in Ohio.

In its interstate aspect, our case is substantially different. Nelson & Sons competed with Rangen, Inc., throughout the several western states, including Idaho. Rangen's commercial bribery of an influential state employee imposed an obstacle to interstate trade more direct in its deleterious consequences upon interstate commerce than the price discrimination practiced in Moore v. Mead's Fine Bread. In Moore, the Supreme Court quoted the following from the Congressional debate:

> "Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade."

Having concluded that commercial bribery is abjured by the Robinson-Patman amendment to Section 2 (c) of the Clayton Act, and that such bribery of a local, intra-state customer directly injured interstate trade, it follows, in the light of the Mead decision,

that the actionable misconduct occurred "in the course of such commerce" within the intendment of 15 U.S.C. 13 (c). It is not required that the bribery be in connection with an interstate sale or transaction.

Defendants also argue that the anti-trust laws do not apply with respect to sales to a sovereign state. We do not agree. The only purpose of such an exception of which we can conceive is to preserve the right of a sovereign to purchase goods as cheaply as possible irrespective of the price to private customers. No problem of this sort is involved here. If we have correctly interpreted Section 15 (c) as an express prohibition of commercial bribery, no reason occurs to us why such misconduct should not be actionable with respect to sales to a sovereign as well as sales to a private citizen or corporation. Compare: Union Carbide and Carbon Corporation v. Nisley (10 CCA 1962), 300 F. 2d 561; Bankers Life & Casualty Co. v. Larson (5 CCA 1958), 257 F. 2d 377; Pfatzer v. Aqua Systems (2 CCA 1947), 162 F. 2d 779.

SHERMAN ACT

SECOND AND THIRD CAUSES OF ACTION

Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) respectively abjure combinations and conspiracies in restraint of trade or commerce and monopolization, attempts to monopolize and conspiracies to monopolize trade or commerce. Plaintiff has framed its second and third causes of action under these sections.

The evidence here proves only bribery of an influ-

ential state employee which had a detrimental restraining effect upon interstate commerce. This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act. This case falls within the principles found controlling in Parmelee Transportation Company v. Keeshin (7 CCA 1961), 292 F. 2d 794, where the Court, in a situation of gross misuse of official influence for private gain, akin to bribery, said: "However, the use of conventional anti-trust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law." That Court quoted extensively from Apex Hosiery Co. v. Leader, 1940, 310 U.S. 469, in which the Supreme Court announced that the Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade such as contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like. Nothing of that kind occurred here. This is a simple case of buying influence, sometimes called commercial bribery, which is cognizable under the anti-trust laws only because of the specific language of 15 U.S.C. 13 (c) and the judicial applications of the section we have noted. The case falls short of proving actionable wrongs under the Sherman Act. Cf. Norville v. Globe Oil & Refining Co. (7 CCA 1962), 303 F. 2d 281.

STATE LAW

FOURTH CAUSE OF ACTION

Inasmuch as we have concluded that the misconduct of the defendants, who were engaged in commerce, occurred in the course of commerce, it is inappropriate and unnecessary to consider the application of Idaho's "Little Robinson-Patman Act" (Section 48-202, Idaho Code), and the Statute of Limitations problem under the state law.

DAMAGES

The impossibility of proving damages with accuracy in this type of case has often been recognized. Defendants, of course, are correct in asserting that during the four year period prior to July, 1952, the only immediate and direct effect of defendants' misconduct was to deprive plaintiff of an opportunity to bid to supply the fish food requirements of the State of Idaho. In a sense, it is pure speculation to say that plaintiff would have obtained all or some part of the business if it had been permitted to compete therefor on equal terms with Rangen, Inc.

But this element of speculation is present in every effort to prove what might have been, rather than what was. The Courts can properly require only that plaintiff prove a reasonable probability of damage in a reasonably certain amount to justify recovery. Story Parchmont Co. v. Paterson Co., 1931, 282 U.S. 545; Bigelow v. RKO Radio Pictures, 1946, 327 U.S. 251; Lessig v. Tidewater Oil Co. (9 CCA 1964), 327 F. 2d

459; Richfield Oil Corporation v. Karseal Corporation (9 CA 1959), 271 F. 2d 709.

The evidence here demonstrates that plaintiff was damaged in its right to compete freely against Rangen, Inc., for the State of Idaho business. Between 1957 and 1962, plaintiff was actively seeking the Idaho business, as was J. R. Clark Co., and perhaps one other producer of fish food, by having tests conducted of the nutritional value of the respective formula foods, and by questing for entry to the Idaho market. When public offers were first solicited in 1962, four suppliers bid, including plaintiff and defendant Rangen, Inc., and plaintiff was successful. We view it as a reasonable and conservative inference from the evidence that plaintiff would, in all probability, have enjoyed one-fourth of the custom of the State of Idaho on a free market. Plaintiff proved, as best it could under the circumstances, that its anticipated profit from gross sales was between 16.5% and 20%. Continuing a conservative approach, we have elected to use a percentage of anticipated profit from gross sales lost of fifteen per cent. In computing damages in this sort of situation, a Court or jury, in order to minimize the element of speculativeness inherent in the facts, need not adopt plaintiff's computation of damages but may award less. Such a lesser award still meets the legal requirement of being supported by the evidence. See: Richfield Oil Corporation v. Karseal Corporation, supra.

DECISION

Plaintiff should have judgment against defendants for actual damages of $18,900, trebled to $56,700, and for reasonable attorney fees in the amount of $7,500. Plaintiff's attorneys shall submit an appropriate form of Judgment.

Dated: September 25, 1964.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act. (15 U.S.C. §13(c)).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Idaho Code, Chapter 48, Section 202(c)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, any thing of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise; provided, however, that in all such transactions of sale and purchase it shall be unlawful for either party to such transaction to pay or grant anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, to the other party to the transaction or to any agent, representative, or other intermediary therein, where such agent, representative, or other intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of the said other party to such transaction.

APPENDIX D

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPEAL from the United States District Court for the District of Idaho, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of appellee and against appellant.

IT IS FURTHER ORDERED AND ADJUDGED that appellee recover against appellants for its costs herein expended and have execution therefor.

IT IS FURTHER ORDERED that plaintiff be, and hereby is allowed an attorney's fee on appeal in the amount of $2,000.00.

COSTS TAXED ON APPEAL:

Reproducing record	$15.00
Attorney's fee	$2,000.00
Total	$2,015.00

Filed and entered October 18, 1965.